

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**DEC 28 2005**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HENRY SAUNDERS,

Defendant - Appellant.

No. 03-10376

D.C. No. CR-02-00321-JAT

MEMORANDUM\*

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

HENRY SAUNDERS,

Defendant - Appellee.

No. 03-10418

D.C. No. CR-02-00321-JAT

Appeal from the United States District Court  
for the District of Arizona  
James A. Teilborg, District Judge, Presiding

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted December 7, 2004  
San Francisco, California

Before: KOZINSKI, W. FLETCHER, and BYBEE, Circuit Judges.

Even if the district court had erred in excluding evidence of the victim's prior false allegation and in allowing evidence of uncharged sexual acts, the error would have been harmless. Whatever the jury may have thought about the victim's truthfulness, Saunders admitted that he had committed sexual acts on the victim to a tribal investigator. In addition, other witnesses testified that Saunders confessed to sexually abusing the victim.

The district court properly relied on a combination of factors under the Sentencing Guidelines to justify a downward departure of Saunders' sentence, and did not impermissibly consider his race in making that departure. The district court also enhanced Saunders' sentence upward four points under the guidelines based on its own finding that Saunders restrained the victim during one incident of abuse and that the victim was in his care, custody, and control during another such incident.

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that where fact-finding results in a mandatory sentence increase, such facts must be found by a jury. The *Booker* Court then determined that the Sentencing Guidelines

are advisory—and not mandatory—in nature. The district court’s enhancement of Saunders’s sentencing is therefore impermissible if the district court considered the Sentencing Guidelines to be mandatory at the time of Saunders’ sentencing.

Accordingly, we grant a limited remand pursuant to our decision in *United States v. Ameline* to determine whether the district court would have imposed the same sentence had it known that the Sentencing Guidelines are advisory. *See* 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc).

We AFFIRM Saunders’ conviction. Consistent with *Ameline*, we REMAND to the district court for the limited consideration of whether the sentence imposed would have been materially different had the district court known the guidelines were advisory.